

Letter of Findings Number: 43-20110290
Underground Storage Tank Fees
For the Tax Years 1999-2010

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ISSUES

I. Underground Storage Tank Fee – Imposition – Environmental Penalty.

Authority: 42 U.S.C. § 6991a; IC § 6-8.1-1-1; IC § 6-8.1-5-1; IC § 13-23-12-1; IC § 13-23-12-4; IC § 13-23-12-6; IC § 13-23-12-7; [328 IAC 1-3-3](#); [329 IAC 9-2-2](#).

Taxpayer protests the imposition of environmental penalties related to unpaid underground storage tank fees.

II. Tax Administration – Interest.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest.

III. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer, an Indiana company, has operated a grocery store/gas station, which contains one (1) underground storage tank ("UST") since the early 1990s. In 1998, pursuant to changes of regulatory requirements, Taxpayer hired a construction company ("Contractor") to install a new UST in the southwest corner of its property and remove its old UST located in the northwest corner of its property. The installation of the new UST ("1998 UST") was completed in December 1998. Subsequently, a UST System Closure inspection of Taxpayer's old UST System ensued and concluded in February 1999.

In May 2011, Taxpayer was informed that it did not register the 1998 UST and was required to pay an UST annual registration fee going back to 1999. Through the Indiana Department of Revenue ("Department"), the Indiana Department of Environmental Management ("IDEM") assessed Taxpayer UST registration fees, interest, ten (10) percent negligence penalty, and "environmental penalties" – \$2,000 for 2003, \$2,000 for 2004, \$2,000 for 2005, \$2,000 for 2006, \$2,000 for 2007, \$2,000 for 2008, and \$2,000 for 2009.

Taxpayer timely protests the assessments. A hearing was held. This Letter of Findings results. Additional facts will be provided as necessary.

I. Underground Storage Tank Fee – Imposition – Environmental Penalty.

DISCUSSION

IC § 13-23-12-1 imposes a fee on underground storage tanks ("USTs"). Although IDEM regulates underground storage tanks for the State, IC § 13-23-12-4 mandates that the Department collect and deposit the underground storage tank fees. IC § 6-8.1-1-1 defines "listed tax" to include "the underground storage tank fee ([IC 13-23](#))." The laws and regulations concerning the Department's collection of listed taxes apply to the Department's collection of the underground storage tank fees. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c).

The fee on USTs is imposed at IC § 13-23-12-1 as follows:

(a) Each year **the owner of an underground storage tank** that has not been closed before July 1 of any year under:

(1) rules adopted under [IC 13-23-1-2](#); or

(2) a requirement imposed by the commissioner before the adoption of rules under [IC 13-23-1-2](#);

shall pay to the department of state revenue an annual registration fee.

(b) The annual registration fee required by this section is as follows:

(1) Ninety dollars (\$90) for each underground petroleum storage tank.

(2) Two hundred forty-five dollars (\$245) for each underground storage tank containing regulated substances other than petroleum.

(c) If an underground storage tank consists of a combination of tanks, a separate fee shall be paid for each tank. **(Emphasis added).**

IC § 13-23-12-6 states that:

[a]t least thirty (30) days before payment of a fee is due in accordance with the schedule established under section 3 of this chapter, the department of state revenue shall **attempt to notify** each **owner** of an underground storage tank **who has submitted notification to the department as required under 42 U.S.C. 6991a(a)** of the requirements of this chapter. **(Emphasis added).**

42 U.S.C. § 6991a(a) states that:

(a) Underground storage tanks

(1) Within 18 months after November 8, 1984, each **owner of an underground storage tank shall notify the State or local agency or department** designated pursuant to subsection (b)(1) of this section of the existence of such tank, specifying the age, size, type, location, and uses of such tank.

...

(3) Any **owner** which brings into use an underground storage tank after the initial notification period specified under paragraph (1), **shall notify the designated State or local agency or department** within thirty days of the existence of such tank, specifying the age, size, type, location and uses of such tank.

(Emphasis added).

IDEM is designated as the local agency in 40 C.F.R. Part 280, Appendix II.

[329 IAC 9-2-2](#), in relevant part, further states:

(a) All notifications required to be submitted under this section **must be submitted on a form and in a format prescribed by the commissioner.**

(b) **Any person who owns an UST system or tank shall, within thirty (30) days of owning such an UST system or tank or bringing such tank or UST system into use, submit notice to the agency to register the tank or UST system....**

(c) An owner required to submit notice under this section shall provide notice for each tank the owner owns. The owner may provide notice for several tanks at one (1) location using one (1) form. An owner with tanks located in more than one (1) place of operation shall submit a separate notification form for each separate place of operation.

(d) **An owner** required to submit notice under this section **shall provide all the information required by the form provided by the agency** for each tank for which notice is submitted.

...

(g) All owners and operators of UST systems who upgrade the tank system to meet upgrade requirements under [329 IAC 9-2.1](#) shall, within thirty (30) days of completing the upgrade, submit notice of the upgrade to the agency.

(h) All owners and operators of UST systems who:

(1) temporarily close a tank system under [329 IAC 9-6-5](#); or

(2) close a tank system under [329 IAC 9-6-1](#);

shall, within thirty (30) days of completing such action, submit notice of this action to the agency. **(Emphasis added).**

Taxpayer asserted that it should not be penalized for the unpaid UST annual registration fees because IDEM had sufficient notification concerning the installation of the 1998 UST. Taxpayer maintained that IDEM failed to register Taxpayer's 1998 UST and also failed to notify Taxpayer that the UST annual registration fees were due. Without notices or billing statements from IDEM or the Department, Taxpayer argued that it would not have known that the UST annual registration fees were due. To support its protest, in addition to an affidavit, Taxpayer submitted additional documentation, including receipts of payments for its old UST registration fees, two (2) letters from IDEM to Taxpayer, dated August 28, 1998, and December 3, 1999, two (2) letters from Contractor to Taxpayer, and a UST System Closure Report ("Report"), which IDEM received on February 19, 1999.

Taxpayer stated that it had timely paid the UST annual registration fees on its old UST until it received the IDEM's letter informing Taxpayer that the 1998 regulations imposed new requirements on the USTs. To comply with the 1998 regulatory mandates, Taxpayer stated that it hired Contractor to install the 1998 UST and to remove its old UST. Referring to Contractor's letters, Taxpayer claimed that Contractor had agreed to and had allegedly "prepared all paperwork to submit to state." At the administrative hearing, Taxpayer stated that it did not file any forms with IDEM after the installation of the 1998 UST because it believed that Contractor had "prepared all paperwork to submit to state." Taxpayer further stated that, subsequently, upon completing a UST System Closure inspection at Taxpayer's facility, IDEM received the Report, which contained a one-page site map, showing locations of the old UST and the 1998 UST. Referring to the Report, IDEM's December 3, 1999 letter to Taxpayer, in relevant part, stated that:

Re: No Further Action

...

The report indicates that the highest contaminant levels remaining on the property are Non-Detectable in the soil. IDEM agrees that these levels pose no significant threat to human health or the environment. Based on the information submitted, no further action is required at this time.

Taxpayer thus believed that it was in compliance and IDEM had sufficient notification concerning installation of the 1998 UST but IDEM failed to register the 1998 UST and to bill Taxpayer accordingly.

Taxpayer's reliance is misplaced. Upon reviewing Taxpayer's documentation, the Report focused on the findings concerning the closure of Taxpayer's old UST. While IDEM's December 3, 1999 letter led Taxpayer to believe that "no further action is required" as to the 1998 UST, the letter specifically addressed the closure of Taxpayer's old UST. Neither the Report nor IDEM's December 3, 1999 letter discussed issues of the 1998 UST. In fact, IDEM has designated that the 45223 form needs to be filed in order to properly register an UST. The

Report did not include the completed 45223 form concerning Taxpayer's 1998 UST. Additionally, the Report contained at least seventy (70) pages, including five (5) appendices. The one-page site map, referred to by Taxpayer, was buried in the Report and, therefore, cannot be considered a sufficient notification of registration of the 1998 UST to IDEM pursuant to [329 IAC 9-2-2](#).

If an owner of a UST does not pay the annual registration fees described in IC § 13-23-12-1, the owner "shall be assessed a penalty of not more than two thousand dollars (\$2,000) per underground storage tank for each year that passes after the fee becomes due and before the fee is paid." IC § 13-23-12-7(a). This penalty is referred to as the "environmental penalty." [328 IAC 1-3-3\(e\)\(3\)](#). The Indiana Administrative Code clarifies this penalty, stating that:

For sites containing only tanks that were never registered, or sites containing only tanks for which no tank fees were paid when due, the penalty will be calculated at two thousand dollars (\$2,000) under [IC 13-23-12-7\(a\)](#) per petroleum underground storage tank per year that passes after each year's fee is due. [328 IAC 1-3-3\(f\)\(2\)\(A\)](#).

Because Taxpayer owns one UST, the Department assessed \$2,000 for 2003, \$2,000 for 2004, \$2,000 for 2005, \$2,000 for 2006, \$2,000 for 2007, \$2,000 for 2008, and \$2,000 for 2009.

In this instance, Taxpayer states that it never received any bills or notices for registration fees since the Contractor completed the installation of the 1998 UST and "prepared all paperwork to submit to state." However, Taxpayer is the owner of the 1998 UST and Contractor was an agent employed by Taxpayer to ensure its compliance with the regulatory requirements. Thus, pursuant to the above statutes and regulations, Taxpayer, as the principal and the owner of the 1998 UST, was ultimately responsible for making sure it was compliant with the federal and Indiana law and regulations. In short, Taxpayer is required to submit the 45223 form to be considered properly registering its 1998 UST and is required to pay the annual registration fees when due.

Since Taxpayer did not register the 1998 UST and did not pay the annual registration fees, the environmental penalties were properly assessed and the Department does not have the statutory authority to waive the environmental penalties.

FINDING

Taxpayer's protest of the environmental penalties related to the unpaid UST annual registration fees is denied.

II. Tax Administration – Interest.

DISCUSSION

Taxpayer protests the imposition of interest.

The Department assessed interest on the unpaid UST annual registration fees. Taxpayer requested that the Department waive interest.

IC § 6-8.1-10-1(a) provides, in relevant part, as follows:

If a person... fails to pay the full amount of tax... by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

Pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest.

FINDING

Taxpayer's protest of interest is respectfully denied.

III. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer requests that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2\(b\)](#) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2\(c\)](#), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has provided sufficient documentation demonstrating that its failure to pay tax was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's request for abatement of the negligence penalty is sustained.

SUMMARY

For the reasons discussed above, Taxpayer's protest of the environmental penalties related to the unpaid UST annual registration fees is respectfully denied. Taxpayer's protest of interest is also respectfully denied. However, Taxpayer's protest of the imposition of the negligence penalty is sustained.

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